RECENT DECISIONS.

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ASSIGNMENTS—FILING—ACTIONS FOR BREACH OF CONTRACT.—Plaintiff sued as the assignee of a building contract. *Held,* the assignment, not being duly filed, was invalid under the Lien Law, Laws 1897, c. 418, § 15, providing that "no assignment of a contract for the performance of labor or the furnishing of materials for the improvement of real property . . . shall be valid, until . . . filed in the office of the county clerk". *Williams Engineering & Contracting Co.* v. *City of New York* (App. Div. 1916) 162 N. Y. Supp. 381.

An assignment of a chose in action need not be recorded in order to be valid in the absence of a specific statutory requirement. *Tingle* v. *Fisher* (1882) 20 W. Va. 497, 510; *McDonald* v. *Preston Nat. Bank* (1897) 111 Mich. 649, 70 N. W. 143; *Bates* v. *Salt Springs Nat. Bank* (1898) 157 N. Y. 322, 51 N. E. 1033. But in accordance with the declaration of § 22 of the Lien Law that the act shall be construed liberally to secure the beneficial interests and purposes thereof, the provision in question has been most thoroughly enforced in behalf of lienors. *Van Kannel etc. Co.* v. *Astor* (1907) 119 App. Div. 214, 104 N. Y. Supp. 653; *Smith & Co.* v. *Douglas* (1915) 165 App. Div. 707, 151 N. Y. Supp. 549. Undoubtedly the instant case comes within the letter of the act, and the decision is supported by some authority. *Asphalt etc. Co.* v. *City of New York* (1916) 218 N. Y. 686, 113 N. E. 1050. But as the statute is in derogation of the common law it should be strictly construed as to its general scope and the legislative intent determined from a general view of the whole act with reference to the object intended to be accomplished. *In re Interstate Pav. Co.* (D. C. 1912) 197 Fed. 371. The object was to protect laborers and materialmen and other persons taking like assignments by giving them notice of the assignment of the contract. *Armstrong* v. *Chisolm* (1904) 99 App. Div. 465, 91 N. Y. Supp. 299; *Harvey* v. *Brewer* (1904) 178 N. Y. 5, 70 N. E. 73; *In re Interstate Pav. Co., supra.* Hence, an assignment is valid against the assignee of the contractor for the benefit of creditors even though filed after the assignment to the latter, for the statute was not made for the protection of the contractors. *Armstrong* v. *Chisolm, supra.* Since there were no other assignors or lienors involved, it seems that the same conclusion might well have been reached in the principal case, for a mechanics' lien statute should be so construed as to render the greatest benefit to those for whose interest it was made and yet save the persons upon whom it operates from injury as far as practicable. *Patrick* v. *Ballentine* (1855) 22 Mo. 143; *In re Interstate Pav. Co., supra.*

ATTORNEY AND CLIENT—DISBARMENT—DUTY TO CLIENT IN CRIMINAL CASE.—In a criminal action an attorney permitted a highly important witness procured by him to testify falsely to an immaterial fact, and, though aware of the falsity of the testimony, adopted it in his summing up. *Held,* one judge dissenting, there is no difference in the duty of an attorney to the court in criminal and civil cases, and he is guilty of professional misconduct warranting his disbarment. *In re Palmieri* (App. Div. 1st Dept. 1916) 162 N. Y. Supp. 799.

It is the affirmative duty of an attorney to protect the administration of justice from perjury and fraud, see *Matter of Robinson* (1912) 151 App. Div. 589, 136 N. Y. Supp. 548, and to aid the court in arriving at the truth, see *In re Thatcher* (C. & D. C. 1911) 190 Fed. 969, 89 N. E. 39, and in a civil case if it develops that a suit is not being prosecuted or defended in good faith, an attorney is under a duty to withdraw at once. Sharswood, Legal Ethics (5th ed.) 96 *et seq.* After accepting a retainer to defend one accused of a crime, however, an attorney may not withdraw because the defense is not meritorious, but it is his duty to use all fair arguments arising on the evidence, Sharswood, *op. cit.*, 107, and to present by all honorable means any defense the law permits, Canon of Ethics, Rule 5, adopted by N. Y. Bar Ass'n. 1910, as a conviction, if one is secured, is based upon evidence alone. In such a case an attorney's duty to his client in no way abrogates or lessens his duty to the court, so as to sanction the introduction or adoption of false testimony. In the determination of disbarment proceedings the element of judicial discretion is naturally a large one, see *In re Durant* (1907) 80 Conn. 140, 67 Atl. 497, which fact makes it difficult to lay down hard and fast rules in all cases. It is clear, however, that disbarment or suspension will be the result of any attempt to deceive the court; *In re Henderson* (1890) 88 Tenn. 531, 13 S. W. 413; or inducing a witness to evade service of subpoena, *In re Robinson* (1910) 140 App. Div. 329, 125 N. Y. S. 193, or to absent himself from trial after service of subpoena, *Stephens* v. *Hill* (1841) 10 M. & W. 28, or to swear falsely; *Matter of Goodman* (1913) 158 App. Div. 465, 143 N. Y. Supp. 577; the manufacturing of evidence, not entirely untrue, but deceptive; *Matter of Gale* (1879) 75 N. Y. 526; the furnishing of answers whether true or false to a witness; *Matter of Eldridge* (1880) 82 N. Y. 161; permitting a client to present false testimony; *People* v. *Beattie* (1891) 137 Ill. 553, 27 N. E. 1069; and continuing a case after knowledge of perjury. *Matter of Mendelsohn* (1912) 150 App. Div. 445, 135 N. Y. Supp. 438. In the principal case the fact that the witness could not have been convicted of perjury does not palliate the conduct of the respondent and the decision of the court is correct.

ATTORNEYS' LIENS—CHARGING LIEN ON DECREE GRANTING LETTERS OF ADMINISTRATION.—Plaintiff attorney obtained a decree granting letters of administration to A, and thereafter performed further legal services for him. Later, B was substituted as administratrix and plaintiff was dismissed. Plaintiff now seeks to enforce his lien under a statute giving an attorney "a lien upon his client's cause of action . . . which attaches to a verdict, report, judgment, or final order in his client's favor and the proceeds thereof". *Held,* (1) plaintiff has a lien on the decree for services up to the time of the decree only; (2) but has no lien on the funds of the estate; (3) the lien on the decree is apparently unenforceable. *In re Nocton's Estate* (N. Y. Surr. Ct. 1916) 162 N. Y. Supp. 215.

Attorneys' liens are of two kinds: retaining liens for costs and fees, which are general on all papers, funds, etc. in the attorney's possession; and charging liens, for costs and fees, though some courts restrict the latter to the amount of the costs. See 15 Columbia Law Rev. 529. Since the lien in the principal case is a special one for the services rendered in the particular action, the court was correct in refusing any lien on the decree for services rendered after the issuance thereof. *Mosely & Ely* v. *Norman* (1883) 74 Ala. 422; *Weed Sewing*

Machine Co. v. *Boutelle* (1884) 56 Vt. 570; 1 Jones, Liens (3rd ed.) § 153. Likewise, since services rendered by an attorney to an administrator usually bind the administrator personally and not the estate, *Lindsay* v. *Darden* (1899) 124 N. C. 307, 32 S. E. 678; *Besancon* v. *Wegner* (1907) 16 N. D. 240, 112 N. W. 965; 2 Woerner, Administration (2nd ed.) § 356, the court rightly denied a lien for such services on the general funds of the estate. *Mercer* v. *Chicago City Ry.* (1912) 174 Ill. App. 234; *contra, Burleigh* v. *Palmer* (1905) 74 Neb. 122, 103 N. W. 1068. Nor is there any lien on the distributive share of the administrator. *In re Rabell* (1916) 162 N. Y. Supp. 218. Even the lien allowed on the decree appears to be unenforceable, for such a decree produces no attachable funds, but merely a right to act for the estate. Nor could the decree granting letters of administration be revoked to satisfy the lien, since that can be done for a statutory cause only; *Matter of McDonald* (1914) 211 N. Y. 272, 105 N. E. 407; *Munroe* v. *People* (1882) 102 Ill. 406; and the protection of an attorneys' lien is not one of these causes. N. Y. Code of Civ. Proc. (1916) § 2569. A later case, citing the principal case with approval, holds that an attorney, in similar circumstances, may petition for an allowance directly from the estate rather than sue the administrator, who in turn would obtain reinbursement from the estate. *In re Rabell, supra.*

CHAMPERTY AND MAINTENANCE—COMMON LAW ACTION FOR MAINTENANCE—EMPLOYMENT OF ONE NOT AN ATTORNEY TO PERFORM LEGAL SERVICES.—A had paid money to the plaintiffs to enter a competition conducted by them. Defendant, a corporation, induced A to bring an action against the present plaintiffs for the return of his money, offering to pay the expenses of A's suit. Judgment with costs was rendered for A in the former action and plaintiff now sues defendant in maintenance for those costs and his attorney's fees. *Held,* he can recover. *Neville* v. *London Express Newspapers Ltd.* (K. B. 1916) 142 L. T. 200.

In violation of Penal Law, § 270, prohibiting non-attornies from rendering legal services, the relators employed T, who was not an attorney, to procure the reduction of a tax assessment. T employed counsel to represent the relators in the tax proceedings. *Held,* though the employment of T was champertous and a court will in general refuse to proceed with a case when the fact that it is tainted with champerty is brought to its attention, yet, since all the parties acted *bona fide,* the case could proceed on abrogation of the champertous agreement. *People ex rel. Holzman* v. *Purdy et al.* (Sup. Ct. 1916) 162 N. Y. Supp. 65. See Notes, p. 333.

COMMERCE—FERRIES AND BRIDGES—RIGHT OF STATES TO REGULATE.—A Kentucky statute prescribed toll rates for foot passenger travel on the defendant's interstate bridge. In an action against the defendant for charging more than the prescribed rates, *held,* the defendant is engaged in interstate commerce and the state cannot fix its rates. *Broadway & Newport Bridge Co.* v. *Commonwealth* (Ky. 1917) 190 S. W. 715.

The power of Congress over interstate commerce is exclusive where the subject is national in character and admits of but one system or plan of regulation; but where the subject is local in nature or operation so that state regulation, though it may lead to some confusion,

is deemed better than no regulation at all, the state may act until Congress asserts its paramount power. 4 Columbia Law Rev. 490; *Gloucester Ferry Co.* v. *Pennsylvania* (1885) 114 U. S. 196, 5 Sup. Ct. 826. Interstate ferries have been considered as falling within the latter class. *Fanning* v. *Gregoire* (1853) 57 U. S. 524; *Port Richmond Ferry Co.* v. *Hudson County* (1914) 234 U. S. 317, 34 Sup. Ct. 821. A state may regulate the tolls on boundary ferries, not a part of a continuous interstate carrier system, for tickets sold within the state for travel from the state, and also for round-trip tickets provided that the ferry company is not compelled to sell them. *Port Richmond Ferry Co.* v. *Hudson County, supra.* It may not, however, prescribe a rate applicable to travel from the other state. *State* v. *Faudre* (1903) 54 W. Va. 122, 46 S. E. 269; see *Port Richmond Ferry Co.* v. *Hudson County, supra.* Moreover, by action of Congress, power over ferries used in connection with interstate railroads has been taken away from the states. *New York Cent. R. R.* v. *Hudson County* (1913) 227 U. S. 248, 33 Sup. Ct. 269. Although regulation of tolls for street cars on interstate bridges might be deemed invalid, *cf. South Covington Ry.* v. *Covington* (1915) 235 U. S. 537, 35 Sup. Ct. 158, on the ground that such cars are more akin to railroads than to ferries, and are not merely local transportation facilities, it is difficult to see why a distinction should be drawn between foot passenger bridges and ferries. Yet the Supreme Court, in *Covington etc. Co.* v. *Kentucky* (1894) 154 U. S. 204, 14 Sup. Ct. 1087, held such a bridge to be subject to the exclusive control of Congress. As authority, however, the case is weak, because four judges refuse to assent to the proposition, and because the fact that the statute under consideration in that case, attempting to regulate rates "to" as well as "from" Kentucky, in itself furnished a ground for the decision. See *Port Richmond Ferry Co.* v. *Hudson County, supra.* Diversity of action through allowing the states to regulate would be no more objectionable in cases of foot passenger bridges than in cases of ferries, and it is submitted that the same rule ought to be applied to both.

CONTRACTS—STATUTE OF FRAUDS—PERFORMANCE WITHIN A YEAR.—The defendant hired the plaintiff on the 26th of November, 1914, to work for a year, work to commence on the morning of the 27th. *Semble,* this contract was one to be performed within a year from the making thereof and hence is not within the inhibition of the Statute of Frauds. *Beller* v. *Klotz* (1916) 31 D. L. R. 647.

The fourth section of the Statute of Frauds permits no action to be brought upon any oral agreement that is not to be performed within the space of one year from the making thereof. Clark, Contracts (3rd ed.) 80. The period begins on the date the contract is made. *Oak Leaf Mill Co.* v. *Cooper* (1912) 103 Ark. 79, 146 S. W. 130; *Sutcliffe* v. *Atlantic Mill* (1882) 13 R. I. 480. The Statute includes any agreement which reasonably interpreted does not admit of performance within the year. See 14 Columbia Law Rev. 693. Hence, the Statute has been held to be no bar if either party has the option to terminate it within the year, *Blake* v. *Voight* (1892) 134 N. Y. 69, 31 N. E. 256; see *Mead* v. *Chicago etc. Ry.* (1914) 189 Ill. App. 323; *contra, Biest* v. *Versteeg Shoe Co.* (1902) 97 Mo. App. 137, 70 S. W. 1081; or if the happening of some contingency will perform it, see 14 Columbia Law Rev. 693, or if the contract is for an indefinite time but may be performed within a year. *Warner* v. *Texas etc. Ry.* (1896)

164 U. S. 418, 17 Sup. Ct. 147; see *Mathews* v. *Wallace* (1904) 104 Mo. App. 96, 78 S. W. 296; but *cf. East Tenn. Tel. Co.* v. *Paris El. Co.* (1914) 156 Ky. 762, 162 S. W. 530. If the contract is of such a personal character that the death of one of the parties at any time would fully perform it, then it is not within the Statute, for such party might die within the year. *Doyle* v. *Dixon* (1867) 97 Mass. 208; *cf. Edwards & Sons* v. *Farve* (1916) 110 Miss. 864, 71 So. 12. If performance of the contract exceeds the year by several days, the cases are clear that the Statute applies. *Britain* v. *Rossiter* (1879) 11 Q. B. D. 123; *Reynolds* v. *First Nat. Bank* (1901) 62 Neb. 747, 87 N. W. 912. But where the contract is made on one day for a year's services to begin on the next, some cases hold, in accord with the principal case, that this is not within the Statute. *Dickson* v. *Frisbee* (1875) 52 Ala. 165; *Smith* v. *Goldcoast etc. Ltd.* [1903] 1 K. B. 285. The better view, however, is that the Statute does apply. *Billington* v. *Cahill* (1889) 51 Hun 132, 4 N. Y. Supp. 660. If the performance of a contract exceeds the year by any length of time, no matter how small, the contract would seem to be within the Statute.

CORPORATION—EFFECT OF CONDITION IN SUBSCRIPTION AGREEMENT.—In an action by a corporation to recover an amount due on a subscription for stock made after the incorporation of the company the defendant avers in his affidavit of defense that the conditions in the subscription regarding the manner of issuing the stock were disregarded without his consent. *Held,* the affidavit is sufficient. *Stiffel & Freeman Inc.* v. *Muth* (C. P. Lancaster County, Pa. 1917) 34 Lancaster Law Rev. 121.

The general rule is that a corporation may dispose of its stock on any terms or conditions that it sees fit, *Caley* v. *Philadelphia etc. R. R.* (1876) 80 Pa. St. 363; *Alexander* v. *North Carolina etc. Co.* (1911) 155 N. C. 124, 71 S. E. 69, and in such a case the subscriber becomes liable for the amount of the subscription on the performance of the condition. *Armstrong* v. *Karshner* (1890) 47 Oh. St. 276, 297, 24 N. E. 897; *Bucksport etc. R. R.* v. *Buck* (1876) 65 Me. 536, 542; *Union Hotel Co.* v. *Hersee* (1880) 79 N. Y. 454. Courts are not agreed, however, on the effect of a condition in a subscription for stock in a corporation to be formed. 1 Thompson, Corporations (2nd ed.) § 528. In New York the subscription is a nullity, see *Troy etc. R. R.* v. *Tibbits* (N. Y. 1854) 18 Barb. 297, 307; in other jurisdictions the subscription is binding but the condition is of no effect; *Boyd* v. *Peach Blossom Ry.* (1879) 90 Pa. St. 169; see *Burke* v. *Smith* (1877) 83 U. S. 390; while other courts consider the subscription as a continuing offer, binding when the condition is performed. *Taggart* v. *Western etc. R. R.* (1866) 24 Md. 563, 595. When the condition affects the course of a turnpike, since that is a matter of direct interest to the public, the subscription is void whether made before, *Butternuts etc. Co.* v. *North* (N. Y. 1841) 1 Hill 518; see *Dix* v. *Shaver* (N. Y. 1878) 14 Hun 392, 395, or after the incorporation of the company. *Ft. Edward etc. Co.* v. *Payne* (1857) 15 N. Y. 583. The principal case in holding sufficient the affidavit of non-performance of the condition, follows the general rule which is well established in that jurdisdiction. *Caley* v. *Philadelphia etc. R. R., supra.*

CORPORATIONS—NON-PAYMENT OF STATUTORY PERCENTAGE WITH SUBSCRIPTION.—The appellant subscribed for stock in the corporation of which the respondent is trustee in bankruptcy, but paid less than 10%

of the amount subscribed as provided by Stock Corporation Law, § 53. He became a director and officer of the corporation and later sold his stock. In an action to recover the unpaid subscription he claimed the contract was invalid because of the failure to comply with the Statute. *Held,* the appellant liable. *Jeffrey* v. *Selwyn* (N. Y. Ct. of App. 1917) 56 N. Y. L. J. 1757.

In most jurisdictions the non-payment of the statutory amount with subscriptions is no defense to an action for the price of the stock. *Pittsburg etc. R. R.* v. *Applegate* (1882) 21 W. Va. 172, 182; *Haywood etc. Co.* v. *Bryan* (1858) 51 N. C. 82; see *Ryder* v. *Alton etc. R. R.* (1851) 13 Ill. 516, 522. The cases *contra, Jenkins* v. *Union Turnpike* Co. (N. Y. 1804) 1 Caine's Cas. *86; *Hibernia Turnpike Co.* v. *Henderson* (Pa. 1822) 8 Serg. & R. *219, follow the statutory provision strictly. There is great reason for preventing the subscriber from escaping liability by means of his own fault, see *Pittsburg etc. R. R.* v. *Applegate, supra,* and there seems to be a tendency to limit these old holdings. 1 Cook, Corporations (6th ed.) §§ 174, 175. So where the subscriber votes as a stockholder, *Clark* v. *Monongahela etc. Co.* (Pa. 1840) 10 Watts 364, or does any act recognizing his membership in the corporation, see *Boyd* v. *Peach Blossom R. R.* (1879) 90 Pa. St. 169, 172, he is estopped to deny his liability. The New York courts recognize that there can be no estoppel against a rule of law, *New York etc. R. R.* v. *Van Horn* (1874) 57 N. Y. 473, and while the contract is held binding if the payment is made subsequent to the subscription, *Beach* v. *Smith* (1864) 30 N. Y. 116, yet where there is simply a subscription without any payment the contract is void. *New York etc. R. R.* v. *Van Horn, supra.* Since the law will not help the parties to unlawful contracts, agreements contrary to statute are held invalid. But it would seem that just as *ultra vires* may not be pleaded to shield unconscientous conduct, *Whitney Arms Co.* v. *Barlow* (1875) 63 N. Y. 62, so this subscription ought not to be held invalid when the subscriber seeks to take advantage of his own fault to defeat the interests of creditors, who are among those for whose protection the Statute was enacted. *Cf.* 3 Thompson, Corporations (2nd ed.) § 2793.

COURTS—JURISDICTION AS AFFECTED BY INTEREST ON DAMAGES.—The plaintiff sued in a court with a jurisdictional limit of $1,000 for $974 damages for injury to cattle shipped by defendant railway. Defendant contends that the addition of interest as damages under the Texas law, brings the total amount in controversy over the court's jurisdictional limit. *Held,* as the addition of interest accruing up to the time of petition filed did not bring the amount in controversy over $1,000, the court was not deprived of jurisdiction by interest subsequently accruing. *Ft. Worth etc. Ry.* v. *Allen* (Tex. Civ. App. 1916) 189 S. W. 765.

While at early common law interest was not allowed in an action for unliquated damages, see 15 Columbia Law Rev. 439, in the United States interest may form a part of the judgment in a tort action for the destruction of, or injury to property. See 13 Columbia Law Rev. 656. It is the general rule that in determining whether a court has jurisdiction, interest is a part of the amount in controversy, *Crawford* v. *Hurd Refrigerator Co.* (1894) 57 Minn. 187, 58 N. W. 985; *Pierson* v. *Hughes* (1904) 88 N. Y. Supp. 1059, except where the statute limiting the jurisdiction provides that such amount shall be exclusive of interest. *State* v. *Fernandez* (1897) 49 La. Ann. 249, 21 So. 260.

But even under such statute, when, as in the jurisdiction of the principal case, certain interest is recoverable not *eo nomine* but as a part of the damages themselves, such interest is to be considered in determining whether the amount involved is within the jurisdictional limit. *Baker* v. *Smelser* (1895) 88 Tex. 26, 29 S. W. 377; *St. Paul Ins. Co.* v. *Peck* (1914) 40 Okla. 396, 139 Pac. 117. But, as indicated by the principal case, the interest to be considered in determining jurisdiction is always confined to that accruing up to the commencement of the action, for it is a rule that a court cannot be ousted of jurisdiction by the accumulation of interest *pendente lite*. *Siensheimer & Co.* v. *Md. etc. Ins. Co.* (Tex. Civ. App. 1913) 157 S. W. 228; *Martin* v. *Payne* (1911) 50 Colo. 171, 114 Pac. 486.

COVENANTS—RIGHT OF TENANT TO TAKE ADVANTAGE OF THE COVENANT OF A CO-TENANT WITH THE LANDLORD.—The plaintiff and the defendant were tenants of adjoining closes from the same landlord. The plaintiff had covenanted with the landlord to keep in repair a division fence between his land and the defendant's. Because of the plaintiff's failure to keep the fence in repair, the defendant's cattle trespassed on his close. *Held*, the breach of the covenant was no defense to an action by the plaintiff against the defendant for the trespass. *Holgate* v. *Bleazard* (K. B. D. 1916) 115 L. T. 788.

In jurisdictions where the benefit as well as the burden of the covenant to fence runs with the land at law, *Countryman* v. *Deck* (N. Y. 1883) 13 Abb. N. C. 110; see *Bronson* v. *Coffin* (1871) 108 Mass. 175, the defendant in the principal case would have prevailed, if the lease to him came after the plaintiff had entered into his covenant with the landlord. But if the lease to the defendant was prior to the covenant, there is another theory on which his plea should have been allowed, even if the benefit does not run with the land at law. Where an owner of land burdens one part of it in favor of an adjoining part, all subsequent owners of the servient tenement, taking with notice, can be compelled in equity, by an action in his own name by a subsequent owner of the dominant tenement, to respect the rights of the latter. *Rogers* v. *Hosegood* [1900] 2 Ch. 388; *Barrow* v. *Richard* (N. Y. 1840) 8 Paige *351; *Parker* v. *Nightingale* (1863) 88 Mass. 341; *Clark* v. *Martin* (1865) 49 Pa. 289. A covenant imposing such a burden creates a negative easement in favor of the dominant tenement, *Re Nisbet & Potts* [1906] 1 Ch. 386, 402; *Gibert* v. *Peteler* (N. Y. 1862) 38 Barb. 488, irrespective of whether the covenant runs with the land at law or not, *London County Council* v. *Allen* [1914] 3 K. B. 642, if only the intention was to annex the benefit to the land. *Rogers* v. *Hosegood, supra*; *Gibert* v. *Peteler, supra*. Since the intention is the essential point, it should make no difference whether the covenant is affirmative or negative, *Cooke* v. *Chilcott* (1876) 3 Ch. D. 694; 3 Pomeroy, Eq. Jur. (3rd ed.) § 1295; *contra*, see *London etc. Ry.* v. *Gomm* (1882) 20 Ch. D. 562, 582. So also it is immaterial whether the covenant was made before the holder of the dominant tenement came in, or after he was already in. *Collins* v. *Castle* (1887) 36 Ch. D. 243; *Barrow* v. *Richard, supra*. The rule as to lessees being the same as the rule about purchasers, Foa, Landlord & Tenant (5th ed.) 257, n. e., and the object of the covenant in the instant case being clearly to benefit the adjoining close, it would seem that the defendant had a good equitable defense which, under modern procedure, he could have pleaded.

CRIMINAL LAW—PERJURY—CONTRADICTORY STATEMENTS AS SUFFICIENT TO SUSTAIN AN ASSIGNMENT OF PERJURY.—The defendant, having made two contradictory statements under oath, was convicted of perjury on an indictment assigning the second statement as untrue. At the trial the defendant admitted the first statement was false. *Held,* the conviction cannot be sustained, since the only evidence of the falsehood of the second statement was the contradictory first statement. *People* v. *McClintic* (Mich. 1916) 160 N. W. 461.

Because of the fear that otherwise witnesses would be constantly charged with perjury on the uncorroborated oath of "unscrupulous and vindictive adversaries", see *Reg.* v. *Hook* (1858) 8 Cox C. C. 5, 11, and because there is "a presumptive equality of credit between persons", see *United States* v. *Wood* (1840) 39 U. S. 430, 440, so that one oath is more than counterbalanced by the oath of the defendant aided by the legal presumption of his innocence, *Schwartz* v. *Commonwealth* (1876) 68 Va. 1025, the general common law rule has developed, that to convict for perjury, there must be two witnesses to prove the charge, or one witness with strong corroborative evidence. Stephen's Dig. Evidence (Chase's 2nd ed.) Art. 122 and note; 2 Chamberlayne, Evidence § 989. But the rule has been variously curtailed, so that now in the United States courts, the defendant's books and documents alone are enough to prove the perjury, *United States* v. *Wood, supra,* while in New York the rule has no application where the proof of the crime is necessarily based on circumstantial evidence. *People* v. *Doody* (1902) 172 N. Y. 165, 64 N. E. 807. And the rule is that the oath of one witness is sufficiently corroborated by the statements, even unsworn, of the defendant. *Reg.* v. *Towey* (1860) 8 Cox C. C. 328; *Commonwealth* v. *Parker* (1848) 56 Mass. 212; see *State* v. *Blize* (1892) 111 Mo. 464, 20 S. W. 210. Hence where the defendant has not only made two contradictory statements, but has also specified which of the two was false, since none of the reasons for the technical rule apply, and since the jury may be allowed to infer corrupt motive from the circumstances, it would seem excessively legalistic to insist rigidly on the application of what has then become an arbitrary rule of thumb. *People* v. *Burden* (1850) 9 Barb. 467; see *Reg.* v. *Hook, supra; contra, Schwartz* v. *Commonwealth, supra.* But if the evidence consists only of the contradictory statements there can be no conviction on either, since it does not appear which statement is the true one, *Reg.* v. *Hughes* (1844) 1 C. & K. *519; *Peterson* v. *State* (1883) 74 Ala. 34; *Billingsley* v. *State* (1906) 49 Tex. Crim. 620, 95 S. W. 520, and since indictments in the alternative are invalid in any criminal proceedings. Hence in the principal case, if the assignment of perjury had been on the admittedly false first statement, there should have been a sustainable conviction; but on the facts the case is correct on principle and in accord with the weight of authority.

CRIMINAL LAW—SUSPENSION OF EXECUTION OF SENTENCE—LATE ENFORCEMENT OF JUDGMENT OF IMPRISONMENT.—Judgment of fine and imprisonment was entered against defendant, but execution thereof was suspended by the court pending decision on defendant's motion that the part of the judgment imposing imprisonment for sixty days be vacated. The motion was continued for six years when it was overruled. *Held,* the court, after much lapse of time, lost the power to imprison the defendant. *People ex rel. Powers* v. *Shattuck* (Ill. 1916) 113 N. E. 921.

It has been said that, unless otherwise provided by statute, the court has inherent power to stay the execution of a sentence in a criminal case. *Weber* v. *State* (1898) 58 Oh. St. 616, 51 N. E. 116; see *In re Collins* (1908) 8 Cal. App. 367, 97 Pac. 188. However, many courts, while conceding the right to suspend execution of sentence as an incident to a writ of error or on some other legal ground, deny the power to suspend indefinitely, *Tanner* v. *Wiggins* (1907) 54 Fla. 203, 45 So. 459; *Reese* v. *Olsen* (1914) 44 Utah 318, 139 Pac. 941, as an unwarranted interference with the executive pardoning power, *In re Webb* (1895) 89 Wis. 354, 62 N. W. 177, and because of the uncertain position in which the defendant would be placed. *In re Strickler* (1893) 51 Kan. 700, 33 Pac. 620. Where the court thus without legal cause suspends execution of imprisonment, it cannot after the expiration of the term of imprisonment commit the defendant. *In re Webb, supra.* But in jurisdictions where the stay of execution is permissible, and where the court suspended execution until further order or conditionally, courts have been held to have power to set aside the order and commit the defendant even at a subsequent term notwithstanding a long lapse of time. *People* v. *Patrich* (1897) 118 Cal. 332, 50 Pac. 425; *In re Hinson* (1911) 156 N. C. 250, 72 S. E. 310. It would seem correct to say that mere delay in inflicting punishment ought not to be sufficient ground for relieving a defendant from serving sentence, unless the lapse of time had been so great that society would not be benefited by the enforcement of the penalty, *Ex parte Bugg* (1912) 163 Mo. App. 44, 145 S. W. 831, or, as suggested in the principal case, the position of the defendant had become so changed by reason of the long delay that it would be most unjust to enforce the sentence.

FRAUD—RIGHT TO RELY ON REPRESENTATIONS.—When, in an action in contract, the defendant averred fraud, the plaintiff urged that the defendant's negligence estopped him from setting up the fraud. *Held,* as between parties to a contract obtained by fraud, negligence is not a sufficient answer to the defense of fraud. *Sutton* v. *Greiner* (Iowa, 1916) 159 N. W. 268.

It has been held that a person lacking in ordinary care and diligence has no claim to relief, *Boulden* v. *Stilwell* (1905) 100 Md. 543, 60 Atl. 609; *Standard Mfg. Co.* v. *Slot* (1904) 121 Wis. 14, 98 N. W. 923, and that when means of knowledge are equally available to both parties, the injured party is under a duty to take advantage of such means. *Brown* v. *Leach* (1871) 107 Mass. 364; see *Slaughter's Adm'r.* v. *Gerson* (1871) 80 U. S. 379. This rule, however, has been enunciated chiefly in cases of misrepresentation of opinion, see *Hunt* v. *Barker* (1900) 22 R. D. 18, 46 Atl. 46, and since it is undoubtedly the law that statements of opinion, as opinion, are not to be relied on, *Deming* v. *Darling* (1889) 148 Mass. 504, 20 N. E. 107, it is correctly applied in such cases. But in its application to representations of material facts, the rule is opposed by a strong and growing line of authorities maintaining that a person is entitled to rely on such representations without inquiry. *Summers* v. *Alexander* (1911) 30 Okla. 198, 120 Pac. 601; *Cottrill* v. *Krum* (1890) 100 Mo. 397, 13 S. W. 753. The question is whether the injured party actually relied, regardless of how a prudent man would have acted, *Western Mfg. Co.* v. *Cotton & Long* (1907) 126 Ky. 749, 104 S. W. 758; *Wilcox* v. *American etc. Co.* (1903) 176 N. Y. 115, 68 N. E. 153, or whether the facts were accessible to both parties. *Riley* v. *Bell* (1903) 120 Iowa 618, 95 N. W. 170;

Buchanan v. *Burnett* (1909) 102 Tex. 492; 119 S. W. 1141. This is true in actions in tort for deceit, *Smith* v. *Werkheiser* (1908) 152 Mich. 177, 115 N. W. 964, where actual fraud is necessary, and in contract actions, *Western Mfg. Co.* v. *Cotton & Long, supra,* and in actions for rescission or specific performance, *Wilson* v. *Carpenter's Adm'r.* (1895) 91 Va. 183, 21 S. E. 243, where fraud is immaterial. *Buchanan* v. *Burnett, supra.* It is submitted that this is a sound rule. The law should protect the credulous as well as the diligent, particularly in cases of actual fraud such as the instant one. Consequently, negligence in relying on the representations of the defrauder should not be a valid answer to the charge of fraud. *White Sewing Machine Co.* v. *Bullock* (1912) 161 N. C. 1, 76 S. E. 634; *Erickson* v. *Fisher* (1892) 51 Minn. 300, 53 N. W. 638.

GARNISHMENT—ATTACHMENT—APPEAL AND ERROR.—Five days after the present plaintiff's demurrer had been sustained in a suit against him by X, the court dismissed a writ of garnishment against the defendant bank, to which ruling X duly excepted, also excepting to a ruling of the court refusing to allow him a reasonable time in which to present to the appellate court the question of tendering a *supersedeas* bond. Two days later the plaintiff presented a check for the funds, which the defendant refused, as X had notified it he was going to appeal, within the thirty days allowed by law, from the judgment dismissing the garnishment. *Held,* the garnishee had no authority to deprive the plaintiff of the possession of his property after the judgment dismissing the writ. *American Nat. Bank* v. *Douglas* (Ark. 1916) 189 S. W. 161.

The rights secured by an attachment are contingent upon a recovery of judgment by the plaintiff and it has been held that a final judgment for the defendant *ipso facto* dissolves the attachment. *Ranft* v. *Young* (1893) 21 Nev. 401, 32 Pac. 490; see *First Nat. Bank* v. *Sanders* (1915) 162 Ky. 374, 172 S. W. 689. The better view, however, is that where by statute a certain time is given in which to appeal, a failure to perfect the appeal within the required time is followed by loss of the lien, *Pfiefer* v. *Hartman* (1882) 60 Miss. 505, and the attachment is discharged without special order by operation of the judgment. *McCormick Machine Co.* v. *Jacobson* (1889) 77 Iowa 582, 42 N. W. 499; *Suydam* v. *Huggeford* (1839) 40 Mass. 465. In such a jurisdiction, after judgment in the principal case, but before the statutory time for appeal has fully elapsed, the defendant may move to have the attachment dissolved, and if the motion is granted the lien is vacated, *Harrow* v. *Lyon* (Iowa 1851) 3 Greene 157, but if a proper appeal is perfected from the order dissolving the attachment, the effect of the dissolution is suspended, and the plaintiff is restored to his original rights under the attachment, *Danforth, Davis & Co.* v. *Carter* (1856) 4 Iowa 230, unless by so doing the rights of innocent third parties would be affected. *Danforth, Davis & Co.* v. *Rupert* (1861) 11 Iowa 547. In some jurisdictions no appeal lies from an order dissolving or refusing to dissolve an attachment until final judgment has been rendered. *Harrison* v. *Thurston* (1867) 11 Fla. 307. However, as such an order affects a separate substantial right, it would seem that the opposite view is the sound one. *Turpin* v. *Coates* (1882) 12 Neb. 321, 11 N. W. 300; *Watson & Co.* v. *Sullivan* (1855) 5 Ohio St. 42. In the principal case after judgment had been entered dismissing the writ of garnishment and discharging the

garnishee, the defendant, in the absence of a statute authorizing it to retain possession of the property, had no authority under the law, or right, to deprive the plaintiff of his property. *Cf. Sherrod* v. *Davis* (1850) 17 Ala. 312.

ILLEGAL CONTRACTS—AGENCY TO PROCURE CONDEMNATION OF REAL ESTATE.—A broker, employed on commission to sell real estate for defendant, secured the condemnation thereof for public use with due compensation. *Held,* on grounds of public policy his commissions cannot be recovered. *Warnock & Emlen* v. *Phila. Trust Co.* (Pa. 1916) 74 Leg. Int. 102.

A contract of agency to secure legislative action or governmental contracts by personal influence or "lobbying" is void as against public policy; *Veazey* v. *Allen* (1903) 173 N. Y. 359, 66 N. E. 103; *Oscanyan* v. *Arms Co.* (1880) 103 U. S. 261; 2 Pomeroy, Eq. Juris. (3rd ed.) § 935; but an agency merely to collect data and lay arguments openly before the governmental body is valid. *Chesebrough* v. *Conover* (1893) 140 N. Y. 382, 35 N. E. 633; see *Oscanyan* v. *Arms Co., supra*; 2 Pomeroy, *op. cit.* § 935, note 3. A leading case has held that the test of the invalidity of these latter contracts is not whether illegitimate services were contemplated by the parties, but whether the tendency of the contract was towards such services; *Tool Co.* v. *Norris* (1864) 69 U. S. 45; and later cases, following it, have held that this tendency exists, *Russell* v. *Courier Print. & Pub. Co.* (1908) 43 Colo. 321, 95 Pac. 936, or is accentuated, *Elkhart County Lodge* v. *Crary* (1884) 98 Ind. 238; *Hazelton* v. *Sheckels* (1906) 202 U. S. 71, 26 Sup. Ct. 567; *Crichfield* v. *Bermudez Asphalt Pav. Co.* (1898) 174 Ill. 466, 51 N. E. 552, wherever the agent is employed for a contingent reward. Since one may deal legally with governmental bodies through an agent, *Winpenny* v. *French* (1869) 18 Oh. St. 469, and since the presumption is that his intentions are honest, until rebutted, such contracts of agency, always excepting "lobbying" contracts, ought not be declared void unless illegitimate methods were expressly or impliedly to be used, and to this effect is the weight of modern authority. *Stroemer* v. *Van Orsdel* (1905) 74 Neb. 132, 103 N. W. 1053; *Obenchain* v. *Ransome-Crummey Co.* (1914) 69 Ore. 547, 138 Pac. 1078; *Kerr* v. *Amer. Pneumatic Service Co.* (1905) 188 Mass. 27, 73 N. E. 857. In the cases which do hold that this tendency avoids the contract, a fair inference of illegal intent was possible, and that has been held to be the real basis of *Tool Co.* v. *Norris, supra. Houlton* v. *Nichol* (1896) 93 Wis. 393, 67 N. W. 715. Assuming that the contract in the principal case could be construed to include the services before the commission, it would seem that the decision was out of line with modern authority in holding it void, for nothing dishonest was contemplated or done.

INFRINGEMENT OF COPYRIGHT—MUSICAL SELECTIONS IN RESTAURANTS—PERFORMANCE FOR PROFIT.—Plaintiffs, holders of copyrights on musical compositions, brought actions for infringement based on public performances given at restaurants without special charge for admission. *Held,* such performances are for profit and violate plaintiffs' copyrights. *Victor Herbert et al.* v. *Shanley Co.* (1917) 37 Sup. Ct. 232.

While at common law an author had a right to a monopoly of his publications, in the United States such a right exists only by statute. *Wheaton* v. *People* (1834) 33 U. S. 591, 658; *American Tobacco Co.* v. *Werckmeister* (1907) 207 U. S. 284, 28 Sup. Ct. 72. The holder of

the copyright of a musical composition, has the exclusive right to perform it publicly for profit. (1909) 35 Stat. 1075. If the doctrine that the rights of the copyright holder are only infringed by performance where admission is charged, *John Church* v. *Hillard Hotel Co.* (2 C. C. A. 1915) 221 Fed. 229, 231; *Herbert et al.* v. *Shanley Co.* (D. C. 1915) 222 Fed. 344; *Herbert* v. *Shanley Co.* (2 C. C. A. 1916) 229 Fed. 340, had been sustained, a very imperfect protection would be afforded. Where such performances are given to attract patrons, they are part of the services rendered and paid for by those who partake of refreshments, and a certain profit accrues to the proprietor of the restaurant. *Sarpy* v. *Holland* (1908) 99 L. T. 317, which properly would seem to belong to the holder of the copyright. In doubtful cases, it would seem that the interests of the holder should be preferred, the underlying purpose of such statutes being to stimulate production by assuring to the composer for a limited time, full pecuniary returns of his composition. See *American Tobacco Co.* v. *Werckmeister, supra.* The decision of the Supreme Court in the principal case seems to carry out the purpose of the statute and is in accord with the tendency of English decisions to construe similar, though not identical, statutory enactments favorably to the holder of the copyright. 1833, 3 & 4 Wm. IV, c. 15; 1842, 5 & 6 Vict., c. 45; Copyright Acts 1911, 1 & 2 Geo. V, c. 46; *Duck* v. *Bates* (1884) 13 Q. B. D. 843; *Wall* v. *Taylor* (1883) 11 Q. B. D. 102; *Russell* v. *Smith* (1848) 12 Q. B. 217.

INJUNCTIONS—RESTRAINING SUIT IN ANOTHER JURISDICTION.—The defendant, a resident of New Jersey, had attached in New York, as assignee of a New York insolvent, a fund of the plaintiff, a New Jersey corporation. The plaintiff sought an injunction, on the ground that under the laws of New Jersey it had an equitable set-off to the insolvent's claim which the New York courts might not recognize. The injunction was refused, as the defendant, though personally a resident of New Jersey, was as assignee officially domiciled in New York, and the proceedings did not, therefore, constitute an attempt to evade the laws of New Jersey. *Federal Trust Co.* v. *Conklin* (N. J. 1916) 99 Atl. 109. See Notes, p. 328.

JOINT TERMINAL FACILITIES—CARRIERS—POWERS OF INTERSTATE COMMERCE COMMISSION TO COMPEL SWITCHING SERVICE—DISCRIMINATION.—Two railways, joint owners of part of the terminal facilities used and managed by them as if title were joint throughout, were ordered to discontinue as discriminatory their practice of refusing to switch interstate traffic to and from the tracks of a third carrier on the same terms as they maintained with respect to similar shipments to and from their own respective tracks. *Held,* this arrangement was not reciprocal switching but the use of joint terminal facilities, and not in violation of the Interstate Commerce Act. *Louisville & Nashville R. R.* v. *United States* (1916) 37 Sup. Ct. 61.

The early decisions gave a broad interpretation to the final proviso of § 3 of the Act to Regulate Commerce (1887) 24 Stat. 380, to the effect that a carrier should not be required to give the use of its tracks or terminal facilities to another carrier engaged in like business, see *Central Stock Yards Co.* v. *L. & N. R. R.* (1904) 192 U. S., 568, 24 Sup. Ct. 339; *L. & N. R. R.* v. *Central Stock Yards Co.* (1909) 212 U. S. 132, 145, 29 Sup. Ct. 246, and held that tracks and terminal

facilities of a carrier could only be used by another carrier for exchange of interstate freight with the consent of the owning carrier, *Little Rock etc. R. R.* v. *St. Louis etc. Ry.* (1894) 59 Fed. 400, 404; see *State of Iowa* v. *Chicago etc. Ry.* (1887) 33 Fed. 391, 396, and that the charge of undue or unreasonable discrimination could not be predicated upon the fact that a carrier allowed one connecting railroad to make a certain use of its tracks and terminal facilities which it did not concede to another. *Little Rock etc. R. R.* v. *St. Louis etc. Ry.* (1894) 63 Fed. 775, 780; *Kentucky & I. Bridge Co.* v. *L. & N. R. R.* (1889) 37 Fed. 567, 628. Later cases encroached upon the protection afforded by this proviso, leaving it difficult to determine whether, or to what extent, it remained operative. *Iowa & So. Ry.* v. *Chicago etc. R. R.* (1914) 32 I. C. C. R. 172; *Waverly Oil Works Co.* v. *Penna. R. R.* (1913) 28 I. C. C. R. 621; *Morris Iron Co.* v. *B. & Q. R. R. Co.* (1912) 26 I. C. C. R. 240. Clearly, after the power of making through routes and rates had been conferred on the Commission, to order a carrier to haul the cars of another over its tracks for reasonable compensation in order to afford service to shippers, was not violative of of the provision, and could not be regarded as compelling a carrier "to give" his tracks or facilities. See *Iowa & So. R. R.* v. *Chicago B. & etc. R. R., supra; St. Louis etc. R. R.* v. *P. & P. U. Ry.* (1913) 26 I. C. C. R. 226, 234; *Waverly Oil Works Co.* v. *Penna R. R., supra.* But the Commission went further, and using the words of discrimination, overturned previous decisions, rendering the proviso of § 3 to a great extent nugatory. *St. Louis etc. R. R.* v. *P. & P. U. Ry., supra,* 235 *et seq*; *L. & N. R. R.* v. *United States* (1915) 238 U. S. 1, 19, 35 Sup. Ct. 696. Reciprocal switching arrangements were held unduly discriminatory; *Penna. Co.* v. *United States* (1915) 236 U. S. 351, 35 Sup. Ct. 370; *Switching at Galesburg, Ill.* (1914) 31 I. C. C. R. 294; likewise according terminal facilities to one carrier and refusing the same to another. *Transportation Bureau of Seattle* v. *G. N. Ry.* (1914) 30 I. C. C. R. 683, 690. The principal case appears to stem the tide in this direction and lend to the carrier's investment the protection from involuntary use by competitors which the proviso of § 3 intended to afford. The decision rests entirely upon the *bona fides* of the arrangement.

LIBEL—RIGHT TO RECOVER FOR IMPUTATION CONDITIONALLY MADE.—One Ryan sent to the press a letter which, paraphrased, read in part to this effect:—"If Ross does not accept my challenge to bet as to the truth of the testimony he recently gave, he threw his honor to the winds in the giving of that testimony". *Held,* (two judges dissenting) the statement, even though conditional, is an actionable libel. *Ryan* v. *Ross* (Australia, 1916) 22 C. L. R. 1.

That a statement conditional in form may contain the elements necessary to support an action for defamation was early asserted in this country. See *Bornman* v. *Boyer* (Pa. 1811) 3 Binn. 515. The exact limitations of the doctrine have never been worked out because of the paucity of decided cases. If the charge made is so conditioned that it can arise only *in futuro* and is not presently provable, there would seem to be no foundation for an action. *Cf. Bays* v. *Hunt* (1882) 60 *Iowa* 251, 14 N. W. 785. However, if the condition involves a fact or act already passed, the statement is clearly defamatory where the condition has been performed and that fact is known to the one to whom publication is made. *Clarke* v. *Zettick* (1891) 153 Mass. 1,

26 N. E. 234. *Ruble* v. *Bunting* (1903) 31 Ind. App. 654, 68 N. E. 1041. The defendant ought also to be held liable even in the absence of evidence of knowledge, where the fact of performance is capable of subsequent ascertainment. However, that the condition has occurred must be alleged by the plaintiff, *Mills* v. *Taylor* (1814) 6 Ky. 469, and if there has been no performance of it, no recovery is possible. *Lang* v. *Gilbert* (1860) 9 N. B. 445. Finally, where a present charge is made on a condition involving a fact or act to occur or not to occur subsequent to the time of statement, the words would seem to convey to the average hearer a present actionable charge, (i. e. one presently provable), subject to what is intended to be a future possible retraction. This is the instant case and the plaintiff was rightly allowed to recover. It follows that as to the existence of the cause of action the performance or non-performance of the condition can be of no consequence, though the form of the statement might effectuate a diminution in damages, if the condition were not performed.

LIENS—GENERAL LIENS—NOTE BROKERS.—A firm of note brokers sold commercial paper, payable to their principal, to a bank giving the latter a written option whereby the bank had the privilege of returning the notes to the brokers within a given period. The proceeds of sale were immediately remitted by the brokers to their principal. Prior to the expiration of the option the principal failed and the bank returned the notes to the brokers who repaid the purchase price out of their own funds. They then resisted a demand of the receiver of the principal for other unsold paper in their hands, claiming a general lien as security for the balance existing in their favor. *Held,* note brokers are not factors in the sense that merely by legal implication from their employment they have a general lien. *Eames* v. *The H. B. Claflin*; *Re Hathaway, Smith, Folds & Company* (2 C. C. A. 1917) 56 N. Y. L. J. 1615. See Notes, p. 320.

MARRIAGE—ANNULMENT FOR IMPOTENCE—RIGHT OF WIFE TO RECOVER MONEY PAID IN CONSIDERATION OF MARRIAGE.—In contemplation of an intended marriage between the parties, plaintiff paid defendant £400. The marriage was annulled because of the impotence of the husband. *Held,* as the effect of the decree of nullity was to make the marriage void *ab initio,* plaintiff was entitled to recover the money as upon a consideration that had failed. *P*—. v. *P*—., Ct. of App. [1916] Ir. 2 K. B. 400.

As the effect of a decree of nullity is to declare that a valid marriage never existed, 11 Columbia Law Rev. 381, the property rights of the parties are unaffected by the form they have gone through. See *In re Van Alstine* (1899) 21 Wash. 194, 57 Pac. 348. Hence the wife retains any cause of action she may have had against the husband, *Henneger* v. *Lomas* (1896) 145 Ind. 287, 44 N. E. 462, and there is no dower. *Price* v. *Price* (1891) 124 N. Y. 589, 27 N. E. 383. Nor is any alimony granted, *Chase* v. *Chase* (1867) 55 Me. 21; *Fuller* v. *Fuller* (1885) 33 Kan. 582, 7 Pac. 241, though the parties are in some cases entitled to an equitable division of the property jointly accumulated while they were living together. *Buckley* v. *Buckley* (1908) 50 Wash. 213, 96 Pac. 1079; *Coats* v. *Coats* (1911) 160 Cal. 171, 118 Pac. 441. The parties are to be restored as nearly as possible to their position at the time of the marriage, *Chase* v. *Chase, supra*; see *Coats* v. *Coats, supra,* and in some states there are statutes specifically

restoring to the wife the whole or an equitable part of any estate the husband may have received from her, *Wheeler* v. *Wheeler* (1891) 79 Wis. 303, 48 N. W. 260, though the rule of *par delictum* may in some cases prevent the restoration of property conveyed. *Szlauzis* v. *Szlauzis* (1912) 255 Ill. 314, 99 N. E. 640. Annulment for impotence is based on a complete failure of the consideration of the marriage contract, see *G*—. v. *G*—. (1903) 67 N. J. Eq. 30, 56 Atl. 736, and as there was no valid marriage the court seems justified in allowing a recovery on the ground that the consideration for the money has entirely failed. 1 Elliott, Contracts, § 254.

MARRIAGE ANNULMENT—CONCEALMENT OF EPILEPSY—FRAUD.—The plaintiff sued to annul the marriage upon the ground that the defendant had concealed her incurable epilepsy. The marriage was consummated before the plaintiff knew of defendant's illness. *Held,* the plaintiff is entitled to a decree of annulment. *McGill* v. *McGill* (Sup. Ct. Onondaga County, Feb. 21st, 1917).

In England concealment of disease by one of the parties affords no ground for the annulment of a marriage by the other, the only fraud justifying annulment being one involving the identity of the parties. *Moss* v. *Moss* (1897) L. R. P. D. 263, 267 *et seq.* American courts have introduced a salutary innovation into the common law and, while not in perfect accord, generally consider fraud as to health, going to the essentials of the marital relations, a ground for annulment. *Smith* v. *Smith* (1898) 171 Mass. 404, 50 N. E. 933. *Svenson* v. *Svenson* (1904) 178 N. Y. 54, 70 N. E. 120. In some states no distinction is made between consummated and unconsummated marriages. *Anonymous* (1897) 21 Misc. 765, 49 N. Y. Supp. 331; *Ryder* v. *Ryder* (1892) 66 Vt. 158, 28 Atl. 1029; *Sobel* v. *Sobel* (1914) 88 Misc. 277, 150 N. Y. Supp. 248; *Meyer* v. *Meyer* (1875) 49 How. Pr. 311. Massachusetts, however, refuses the decree after consummation. *Vondal* v. *Vondal* (1900) 175 Mass. 385, 56 N. E. 586. While courts frequently invoke social interests to justify retention of the marriage tie, *Fisk* v. *Fisk* (1896) 6 App. Div. 432, 434, 39 N. Y. S. 969; see *Carris* v. *Carris* (1872) 24 N. J. Eq. 516, 522, a public interest in the dissolution of the marriage likely to result in defective offspring seems to concern the courts only incidentally, see *Vondal* v. *Vondal, supra*; but see *Sobel* v. *Sobel, supra,* the guiding consideration being the danger of contagion to the innocent party, *Ryder* v. *Ryder, supra*; *Anonymous, supra*; *Svenson* v. *Svenson, supra,* or the impossibility to fulfill the marital duty. See *Lyon* v. *Lyon* (1907) 230 Ill. 366, 82 N. E. 850. Hence, it is to be expected that annulment would generally be refused for tuberculosis, *Gumbiner* v. *Gumbiner* (1911) 72 Misc. 211, 213, 131 N. Y. Supp. 85; *contra, Sobel* v. *Sobel, supra,* epilepsy, *Elser* v. *Elser* (N. Y. 1916) 160 N. Y. Supp. 724; *Lyon* v. *Barney* (1907) 132 Ill. App. 45, aff'd. *Lyon* v. *Lyon, supra,* or inherited insanity. See *Allen* v. *Allen* (1915) 85 N. J. Eq. 55, 95 Atl. 363. In laying emphasis upon eugenic considerations the court in the principal case exercises in a commendable way the wide discretion which American courts have employed in dissolving the marital relation and adopts the modern social view, increasingly reflected in legislation, see *Gould* v. *Gould* (1905) 78 Conn. 242, 64 Atl. 604, but finding no root in the common law.

MORTGAGES—PRIORITY—MORTGAGE OF VENDEE'S INTEREST.—The defendant contracted to buy certain land, paid $100 down, and went into

possession. He then gave a mortgage for $3,000 to the plaintiff, who recorded it. After paying the balance of the purchase price and securing a conveyance, the defedant executed another mortgage to one G, who had notice of the plaintiff's mortgage. In a foreclosure suit by the plaintiff against the defendant and an assignee of the second mortgage, *held,* the plaintiff's mortgage was a lien on the property for the sum of $100 only. *Gray* v. *Delpho* (Sup. Ct. 1916) 97 Misc. 37, 162 N. Y. Supp. 194. See Notes, p. 323.

MUTUAL BENEFIT SOCIETIES—WAIVER OF PROVISION OF CONSTITUTION.—The constitution of a mutual benefit society provided that a suspended member might be reinstated upon the production of a certificate of good health, and that modifications or alterations to the constitution should be passed at the next meeting after that in which they had been proposed. The insured, having been suspended, presented at a meeting of the society a certificate that he was sick but improving, and was thereupon reinstated by vote of the members. *Held,* the certificate not complying with the provisions of the constitution, the society could not waive them except in the manner therein provided. *Societa Unione Fratellanza Italiana* v. *Leyden* (Mass. 1917) 114 N. E. 738.

The constitution and by-laws of a mutual benefit society are part of the contract of insurance, and every member is therefore bound by their provisions. *Supreme Lodge* v. *Knight* (1889) 117 Ind. 489, 20 N. E. 479. But if the terms of the policy are in conflict with the constitution the policy will prevail, unless *ultra vires. Davidson* v. *Old People's etc. Soc.* (1888) 39 Minn. 303, 39 N. W. 803. While most jurisdictions in dealing with questions of waiver and estoppel consider the difference between mutual and other insurance companies as nominal, a few courts have given effect to the double relation of insurer and insured which each member bears to his fellow-members. 1 Bacon, Benefit Societies & Life Insurance (3rd ed.) § 147. Hence, agents and officers have in such jurisdictions, no power to waive express provisions of the by-laws, *Lyon* v. *Royal Society* (1891) 153 Mass. 83, 26 N. E. 236, unless such provisions do not go to the essence of the contract. See *Brewer* v. *Chelsea etc. Co.* (1859) 80 Mass. 203. Nor can an estoppel arise since both parties are bound to know the by-laws. *Miller* v. *Hillsborough Mut. Fire Ass'n.* (1887) 42 N. J. Eq. 459, 7 Atl. 895. The general rule, however, is that the society may by its own acts waive the by-laws or be estopped to deny that the insured has conformed to them. *Wiberg* v. *Minn. Scand. Relief Ass'n.* (1898) 73 Minn. 297, 76 N. W. 37; *Timberlake* v. *Order of the Grand Circle* (1911) 208 Mass. 411, 94 N. E. 685. It would seem that in the principal case, as the society itself acted upon the application for reinstatement, the constitutional requirements would be thereby waived, had it not by its own by-laws expressly limited its right to alter or modify, of which limitation the insured is charged with knowledge.

PROCESS—EXEMPTION OF NON-RESIDENT ATTORNEY FROM SERVICE OF SUMMONS.—An attorney for a non-resident party came into the state to take the deposition of a witness residing therein for use in a trial pending in the state of the attorney's residence. *Held,* the exemption from civil process which is extended by law to a suitor or witness while necessarily without the jurisdiction of his residence for the

purpose of attending a judicial proceeding, does not apply to an attorney in this situation. *Nelson* v. *McNulty* (Minn. 1917) 160 N. W. 795. See Notes, p. 325.

STATUTE OF FRAUDS—"CONTRACT OF SALE" OF GOODS—PART ACCEPTANCE—ONE OR TWO CONTRACTS.—Defendant's buyer gave an order to plaintiff, a shoe manufacturer, for shoes to be manufactured and shipped to defendant's two stores. *Held,* the contract was one of sale within the Statute of Frauds, but the evidence that there was only one sale, so that acceptance of the goods shipped to one store would take the contract out of the statute, was sufficient to go to the jury. *Krippendorf-Dittman Co.* v. *Hunt-Riddick Mercantile Co.* (Mo. App. 1916) 190 S. W. 44.

While this transaction would not come within the statute under the New York rule, which requires a thing existing *in solido, Crookshank* v. *Burrell* (N. Y. 1820) 18 Johns. *58; *Parsons* v. *Loucks* (1871) 48 N. Y. 17, it would when carried out result in the sale of a chattel and hence is within the statute under the rule of *Lee* v. *Griffin* (1861) 1 B. & S. 272, commended by several text writers, Benjamin, Sales (5th ed.) 158; Burdick, Sales (3rd ed.) § 36; Williston, Sales § 55, and adopted in Missouri. *Schmidt* v. *Rozier* (1906) 121 Mo. App. 306, 98 S. W. 791. The same result would be reached in this case under the prevailing American rule, which includes all contracts for the sale of articles then existing or such as the vendor ordinarily manufactures or procures for his general trade. *Goddard* v. *Binney* (1874) 115 Mass. 450; *Courtney* v. *Bridal Veil Box Factory* (1909) 55 Ore. 210, 105 Pac. 896; *In re Gies' Estate* (1910) 160 Mich. 502, 125 N. W. 420. Whether there was an acceptance and receipt of part of the goods is generally a question of fact for the jury, *Standard Wall Paper Co.* v. *Towns* (1903) 72 N. H. 324, 56 Atl. 744; *McMillan* v. *Heaps* (1909) 85 Neb. 535, 123 N. W. 1041, and the same is true of the question whether all the dealings constitute a single transaction, so that part acceptance will take the whole out of the statute. *Brock* v. *Knower* (N. Y. 1885) 37 Hun 609; *Weeks* v. *Crie* (1900) 94 Me. 458, 48 Atl. 107. It would seem that the rules of construction used in such cases would be closely analogous to, if not identical with, those employed in determining whether a contract is entire or severable, see 16 Columbia Law Rev. 67, though the tendency where the Statute of Frauds is involved, would probably be towards holding the contract single. See *Brick* v. *Knower, supra*; *Weeks* v. *Crie, supra.* Hence the court here was at least justified in leaving the question to the jury.

WILLS—CONTINGENT DEVISES—EFFECT OF FAILURE OF PRIOR GIFTS.—There was a devise in trust to A for life with remainder to his unborn son, and in default of such issue to B. A disclaimed his interest and the court permitted B to take the income until the birth of A's son.—*In re Willis* (Ch. Div. 1916) Weekly Notes, 430. See Notes, p. 330.

WILLS—CONTINGENT REMAINDERS—VALIDITY IN CASE OF UNCERTAINTY.—The testatrix devised to her son for life, remainder to those of her children who should support and care for him. In a partition suit brought against the defendants who had concededly fulfilled the condition, *held,* (one judge dissenting), the devise is void for uncertainty. *Summers* v. *Summers* (Ala. 1916) 73 So. 401.

Where the person intended to take under a will is not legally capable of ascertainment, the gift will be held void for uncertainty. 1 Jarman, Wills (6th ed.) 470-471. However, mere description of the beneficiary, regardless of precise naming, if actually designating the one intended, is sufficient. *American Dramatic Fund Assoc.* v. *Lett* (1886) 42 N. J. Eq. 43, 6 Atl. 280; *In re Donnellan's Estate* (1912) 164 Cal. 14, 127 Pac. 166. Given such description, it is immaterial that in its terms it makes the objects of gift depend on circumstances or acts of persons which are future and contingent. 1 Jarman, *op. cit.*, 511. Thus courts do not require that the beneficiary or beneficiaries be ascertainable at the time the will is executed, *Stubbs* v. *Sargon* (1837) 2 Keen 255; *Dennis* v. *Holsapple* (1897) 148 Ind. 297, 47 N. E. 631, and the existence of a class of contingent remainders arising where a remainder is limited to a person or persons not ascertained or not in being at the time the limitation is made, 1 Fearne, Contingent Remainders (10th ed.) 8, proves that the taker need not be identified even when the will comes into operation, provided that, as in the case of all contingent remainders, Williams, Real Property, (21st ed.) 363, he is ascertainable *eo instanti* that the preceding particular estate determines. Even if the gift is such that one or more persons may at their own option place themselves within the terms of the description and thereby cause the estate to vest, the courts assume that there is no fatal uncertainty. *Tiffin* v. *Longman* (1852) 15 Beav. 275. Indeed even where the act required is one susceptible of exclusive performance by one of the possible takers, the courts have not allowed the difficulty, presented by the possibility of a struggle between the beneficiaries, to render the bequest or devise void for uncertainty. *Harriman* v. *Harriman* (1879) 59 N. H. 135; *cf. Whitesides* v. *Whitesides* (1888) 28 S. C. 325, 5 S. E. 816. This is probably because in ascertaining the beneficiary only the fact of performance by the time of the termination of the preceding estate is of importance. The principal case, in reaching the opposite conclusion, appears out of line with principle and authority.